IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1061 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MOCHI BHIKHU RAMJI

Versus

ABDUL AZIZ TARMOHYMAD BY HIS HEIRS

Appearance:

MR GAURANG H BHATT for the Petitioner

MR MS SHAH for the Respondents

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 17/11/2000

ORAL JUDGEMENT

#. This is tenant's revision under sec.29(2) of the Bombay Rent Act (for short, the Act), against the concurrent judgments and decrees of the trial Court as well as the appellate Court.

#. The brief facts are that the deceased landlord Abdul

Aziz filed a suit for eviction of the revisionist on the grounds that he was tenant of the demised premises on monthly rent of Rs.35=00 and he was in arrears of rent for eight months from 1-2-1975 to 3-9-1975, which he failed to pay within a month of service of notice of demand.

#. The suit was contested by the tenant, raising dispute of standard rent and also pleading payment of rent and alleging that he was not in arrears of rent exceeding six months and that he was ready and willing to pay the rent.

#. The trial Court found that the standard rent was the agreed rent of Rs.35=00 per month. It was further found by the trial Court that the tenant was in arrears of rent exceeding six months. The plea of payment of rent or the tender of rent was disbelieved by the trial Court. The trial Court also found that the tenant was not entitled to protection of sec.12(3)(b) of the Act. With these findings, the suit was decreed.

#. Feeling aggrieved, the tenant/revisionist filed an appeal which was also dismissed. It is, therefore, this revision against the concurrent judgments and decrees of the two courts below.

#. The learned counsel for the revisionist Shri Gaurang H.Bhatt and learned counsel for the respondent Shri MS Shah have been heard and the judgments and decrees of the two courts below have been examined.

#. The learned counsel for the revisionist has contended that this case is not covered by sec.12(3)(a) of the Act and that since the entire amount was paid in the trial Court, as well as, in the appellate Court, he was entitled to relief against eviction under sec.12(3)(b) of the Act.

#. Shri Shah, contended that the suit was filed under sec.12(3)(a) of the Act, and in case it is found that the ingredients of this section were fulfilled and established by the landlord then the courts below had no option but, to decree the suit for eviction. There can not be any dispute about this contention of Shri Shah. However, it has to be seen, whether the conditions of sec.12(3)(a) are actually established by the landlord. Since the two courts below have concurrently found that ingredients of sec.12(3)(a) are established, there remains little scope for interference in this revision. However, interference is possible only when it is found that the findings recorded by the two courts below, no

matter concurrent, are illegal or perverse.

#. So far as the ingredients of sec.12(3)(a) are concerned, there are four essential requirements to be established by the landlord before he can get a decree for eviction of a tenant.
The first is that, the rent should be payable monthly. Secondly, there should not be any dispute regarding amount of standard rent or permitted increases of rent, if any. Thirdly, the arrears of rent should exceed six months. Lastly, the tenant fails to pay the arrears of rent exceeding six months within a period of one month after service of notice of demand under sec.12(2) of the Act.

##. Sec.12(3)(b) will apply only to those cases where sec.12(3)(a) is not applicable. If, however, sec.12(3)(a) is applicable, decree of eviction has to be passed and the protection available to the tenant under sec.12(3)(b) will be of no consequence.

##. The learned counsel for the revisionist has contended that it was not a case where the rent was payable monthly. According to him, the educational cess and municipal tax were also included in the amount of rent. Moreover, the educational cess and municipal tax since are not payable monthly but annually, it can not be said that the rent was payable monthly. As against this, Shri Shah has rightly contended that it was not a case of the tenant/revisionist, either in the written statement or in the witness box, that the rent included educational cess and municipal tax or that it was the liability of the tenant to pay educational cess and municipal tax. In the plaint also, it was pointed out that, no demand was made from the tenant regarding educational cess or municipal tax, nor these amounts were demanded in the demand notice under sec.12(2) of the Act. As such, the rent will be deemed to be payable monthly and the nature of tenancy will also be monthly. I find force in this contention. In the absence of any evidence on record that the tenant was obliged to pay educational cess and municipal tax, it can not be said that the rent was not payable monthly or that these amounts were integral part of the rent. Consequently, the first ingredient of sec.12(3)(a) is established.

##. Regarding second condition, learned counsel for the revisionist pointed out that there was dispute regarding standard rent, and as such, sec.12(3)(a) is not applicable. He has pointed out that the notice of demand

was served on 27-9-1975, whereas the tenant/revisionist moved an application for fixation of rent under sec.11 of the Act on 21-10-1975; and since the dispute of standard rent was raised within a month of service of notice of demand, it will be deemed that there existed dispute of standard rent; and as such, the case is not covered by sec.12(3)(a) of the Act. He further argued that the said application was dismissed in default on 30-9-1978 but, since the dismissal in default was not deliberate, it has no effect and it will be deemed that the dispute of standard rent was bonafide and was pending. It may however be mentioned that, neither the certified copy of the application for fixation of standard rent, nor the order of dismissal in default of standard rent application was brought on record of the trial Court nor it was filed before the appellate Court by moving application under Order 41 Rule 27 of CPC. For the first time, the learned counsel for the revisionist has shown me today the certified copy of the said application, which also bears the order of dismissal in default. However, there is no provision for admitting additional evidence in revision, nor any application for admitting additional evidence in revision has been moved. Even if, the said application is perused, it appears that the application was moved under sec.11 on 21-10-1975, which was dismissed in default on 30-9-1978. It, therefore, follows that for a period about three years, the said application remained pending and was dismissed in default on 30-9-1978. On these facts, learned counsel for the revisionist, placing reliance upon the Supreme Court verdict in Premjibhai Vithaldas v/s. Ganeshbhai 1977 GLR 790, contended that bonafide dispute of standard rent did exist despite dismissal of application for fixation of standard rent in default. In my view, the contention of Shri Bhatt for the revisionist can not be accepted. Even, in this case, the Apex Court has held that, 'where a tenant does not prosecute an application for fixation of standard rent and deliberately permits it to be dismissed for non-prosecution, it can be reasonably inferred that it was not a bonafide application at all.' Learned counsel for the revisionist, however, contended that it was not a deliberate act of the revisionist in getting his application for fixation of standard rent dismissed in default, and since the Apex Court has emphasized upon deliberate act of the tenant in getting such application dismissed in default, the decree for eviction was illegally passed by the two courts below. It has, therefore, to be seen, what is meant by the word "deliberately" and the phrase act of the tenant in deliberately getting the application for fixation of standard rent dismissed in default. The word

"deliberate" means intentional dismissal of such application in default. Whether it was intentional dismissal of such application in default or not, has to be decided with reference to the facts and circumstances of each case. In the case before me, application under sec.11 was moved on 21-10-1975. For a period of three years, it remained pending and no serious effort was made by the tenant to get it decided though the suit was already pending. This itself shows that the tenant was not in a mood to press the application for fixation of standard rent in right earnest. It was dismissed in default on 30-9-1978 but, no attempt was made by the revisionist to move an application for restoration of that application. Restoration of such application is not barred, rather it is permissible and it was so indicated in the judgment of this Court in Harilal Gordhanbhai v/s. Ramniklal D.Ratneshwar 1996(1) GLR 447. Since no application for restoration of the application under sec.11 of the Act was moved, it will be deemed that it was intentional and deliberate act of the tenant in getting his application for fixation of standard rent dismissed in default. On these facts, it can safely be said that the Apex Court's verdict cited by the learned counsel for the revisionist in Premjibhai Vithaldas v/s. Ganeshbhai (Supra) rather goes against him.

##. The revisionist did not move any second application for fixation of standard rent after his first application was dismissed in default. In Harilal Gordhanbhai v/s. Ramniklal D. Ratneshwar (Supra), it was laid down, following the decision of this Court in Mangaldas Nenumal v/s. Hasumati Jashwantrai 1983(2) GLR 1364 that the substantive provision in this connection namely right of a tenant to get the standard rent fixed can not be set at naught by the provision, such as Order 9 Rule 9 of CPC. It was further held that the second application or fresh application for fixation of standard rent under sec.11(3) is not barred, as there was no fixation of standard rent on merits when the first application was dismissed in default. All these would go to show that it was deliberate act of the tenant in getting his application under sec.11 dismissed in default. Consequently, it will be deemed that no real and bonafide dispute of standard rent was pending. It may also be mentioned that the two courts below have concurrently held that the standard rent was nothing but, agreed rent and the agreed rent at the rate of Rs.35=00 per month can not be said to be excessive or exorbitant. In this view of the matter also, it can not be said that there was real and bonafide dispute regarding standard rent. As such, the second ingredient of sec.12(3)(a) is also established.

##. Coming to the third ingredient, there is concurrent finding of fact recorded by the two courts below that the tenant/revisionist was in arrears of rent exceeding six months, namely, eight months. This finding of fact hardly requires any interference in this revision. Thus, the third ingredient is also established.

##. Coming to the fourth ingredient, there is again concurrent finding of the two courts below that, within a period of one month of service of notice of demand, the arrears of rent exceeding six months, namely, eight months was not paid to the landlord. As such, the fourth condition is also established. Since all the four conditions of sec.12(3)(a) were established, the courts below committed no illegality in passing the decree for eviction.

##. Shri Gaurang Bhatt, learned counsel for the revisionist, however, contended that since the tenant has deposited the entire rent in the trial Court as well as in the appellate Court up-to-date, the decree for eviction could not be passed. This contention could have been accepted only if the case is covered by sec.12(3)(b). If the case is covered by sec.12(3)(a), in that case, the protection available to the tenant under sec.12(3)(b) would hardly be available. However, the trial Court has alternatively examined the applicability of sec.12(3)(b) also and came to the conclusion that the tenant was not entitled to protection of sec.12(3)(b). The appellate Court rightly did not consider this aspect when it observed that the case is covered by sec.12(3)(a).

##. For the reasons stated above, I do not find any illegality in the concurrent findings recorded by the two courts below. There is no merit in this revision, which is hereby dismissed with no order as to costs.

November 17, 2000. [D.C. Srivastava, J.]

/sakkaf